NO. 22727

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EON LEONARD MIZRAHI,	)
	)
APPELLANT,	)
	)
vs.	)
	)
NITED STATES OF AMERICA,	)
	)
APPELLEE.	)
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	)
	)
	)

APPELLANT'S REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

At the outset, Appellant invites the Court's attention to the fact that his Motion to Remand for further evidence (App. Br. pp. 12-13) is not opposed by the Government's brief.

See: Stafford v. United States, 2d Cir.,1968, 289 F2d 215, where Court remanded case to trial judge "to ascertain if the Local Board determined that appellant's claim had matured before the induction notice was sent...." (p. 219)

By extracting appellant's statements out of context, the Government seeks to convey the impression that appellant's beliefs are personal or political.

Read as a whole, appellant's claim is primarily, if not exclusively, based on his religious training and beliefs. And that is all that is required.

Fleming v. United States, CA 10th, 1965, 344 F.2d 912, 916

The Government contends that appellant's participation in anti-war demonstrations conclusively shows that his conscientious objection beliefs preceded his induction notice, thereby barring his claim from consideration (Gov't. Br. p.17)

The point is irrelevant because, as we shall see momentarily, appellant's claim preceded the mailing of his induction notice by one day.

However, even if relevant, participation in anti-war demonstrations does not establish the maturation date of bona fide conscientious objection to all wars.

But the principal issue here is whether appellant's claim preceded his induction notice. So we move on to that question.

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POINT I

APPELLANT'S CLAIM TO CONSCIENTIOUS OBJECTOR STATUS PRECEDED THE MAILING OF HIS INDUCTION NOTICE. AND THEREFORE THE LOCAL BOARD'S TELEPHONIC REJECTION OF HIS CLAIM WAS ILLEGAL AND PREJUDICIAL.

The Government contends that appellant's letter of February 26 presented "no facts whatever" indicating that a change of status had occurred beyond appellant's control, and hence, the Local Board was powerless to reopen. (Gov't Br.pp.13-14)

The record fails to support the Government's thesis. The Board itself noted on the cover sheet that appellant's claim presented "new information," even if deemed insufficient to warrant reopening (Ex. A, p.11).

Moreover, appellant's February 26 letter stated:

> "I wish to claim status as a conscientious objector and be classified as 1-O.
>
> "Please send me application forms SSS 150."

That letter obviously presented a new fact, namely, that appellant had become a conscientious objector.

Besides, the maturity of conscientious scruples against war, even if belated, is clearly a circumstance over which a registrant has no control. As this Court observed in Ehlert v. United States, 9th Cir. #21930, decided September 11, 1968:

/

"We here hold that the dictates of a registrant's conscience can constitute a circumstance beyond his control. Conscientious objection itself would seem to be a contradiction of control."

To the same effect is United States v. Gearey, 2d Cir., 1966, 368 F.2d 144, 150.

However, it was unnecessary for the Local Board to make the finding prescribed for late claims by SSR § 1625.2(b) because appellant's claim was - or should have been - deemed filed on February 27, the day before the induction notice was mailed.

Under this view, appellant's form 150, filed on March 8, was merely supplementary to appellant's claim; and the Local Board was therefore under a duty to reopen appellant's classification.

The envelope containing appellant's said letter of February 26 bears a postal mark of February 27 (Ex. A, p.96-97).

SSR § 1604.1(a) and (b) authorizes the Selective Service Director to prescribe "such rules and regulations as he shall deem necessary for the administration of the Selective Service System" and "to issue such public notices, orders and instructions as shall be necessary for carrying out the functions of the Selective Service System."

The Director is also empowered by SSR § 1606.51 to revise and prescribe Selective Service forms, which revisions thereby "become a part of the Selective Service regulations..."

Pursuant to the foregoing authority, the Director issued Local Board Memorandum No.72 on December 17, 1962, which was - and still is - in effect at all times relevant hereto. That order provides, in pertinent part, as follows:

> "1. Selective Service Regulations provide that a registrant, to be entitled to a procedural right or to qualify for a status, must file with or submit to the Local Board a notice or information within a specified period of time or before a 'cut-off' date.
>
> "2. When such a notice or information is filed with or submitted to the Local Board by mail, the date of mailing as shown by the postmark on the envelope and not the date it was received by the Local Board shall be used in determining whether the filing or submission is timely.
>
> * * * * * *"
>
> (emphasis supplied)

Appellant's claim was supposed to be filed within ten days after his change of status occurred (SSR § 1625.1(b)). Therefore, appellant's letter of February 26 was one of those embraced by Local Board Memorandum No.72; and, though actually received by the Board on February 28, should have been deemed received on the preceding day.

In further support of this view, reference is made to Local Board Memorandum No.41, issued by the Director on November 30, 1951, and amended on July 30, 1968. That directive states in relevant part:

> " * * * * *
>
> 2. A registrant should be considered to have claimed a conscientious objection to war if he has signed Series VIII of the Classification Questionnaire (SSS Form No.100), if he has filed a Special Form for Conscientious Objectors (SSS Form No.150), or, IF HE HAS FILED ANY OTHER WRITTEN STATEMENT CLAIMING THAT HE IS A CONSCIENTIOUS OBJECTOR."

Appellant's February 26 letter states:

> "I wish to claim status as a Conscientious Objector to be classified as 1-O.
>
> "Please send me application forms SSS 150."

That letter is clearly "a written statement claiming "that he [Appellant] is a Conscientious Objector," within the meaning of Selective Service Regulation § 1625.2 as construed by the Director in his Memorandum No.41.

Communications by a registrant to his Board will be given their manifest intent despite the use of isolated and seemingly contradictory words or phrases.

Wyman v. La Rose, 9th Cir., 1955, 223 F.2d 849, 852

United States v. Vincelli, 2d Cir., 1954

215 F.2d 210, 213

Although Appellant's Form 150 was not filed until ten days after the mailing of his induction notice, it was supplemental only, and so, did not itself invoke the reopening process.

Thus, § 1621.11 states in relevant part:

> "A registrant who claims to be a Conscientious Objector shall offer information in substantiation of his claim in a Special Form for Conscientious Objectors (SSS Form No.150) which, when filed, shall become a part of his classification questionnaire (SSS Form No. 100)." (Emphasis added)

The first sentence under the instructions on appellant's Form 150 contains virtually the same language (EX. A, p.104).

There is even the suggestion in United States v. Vincelli, 2d Cir., 1954, 215 F.2d 210, at p.213, which is tempered somewhat on rehearing, 216 F.2d 681, because of United States v. Nugent, 346 U.S.1, 73 S. Ct. 991, that the mailing of the Form 150 in itself constituted a reopening of the registrant's classification.

Here, the Board sent appellant Form 150 on March 2 with a mandate that it be returned on March 8. It was; and thereafter, two Board members purported to render telephonic decisions denying reopening.

Under any or all of the foregoing theories, it is

evident that appellant's claim preceded the mailing of his induction notice, and his classification should therefore have been reopened because stating a prima facie case for 1-O classification.

Miller v. United States, 9th Cir., 1967, 388 F.2d 973

Stain v. United States, 9th Cir., 1956, 235 F.2d 339

Brown v. United States, 9th Cir., 1954, 216 F.2d 258

The Government's assertion that appellant was not prejudiced by the telephonic "meeting" of the two Board members is, of course, mooted by the timeliness of appellant's claim; and in any event is patently erroneous.

For one thing, the telephonic meeting deprived appellant of his right to have the Board members fairly consider the information presented in his Form 150, rather than have portions of it, if any, or the clerk's interpretations thereof, read to them over the phone; and in preference to an adjudication by a Court.

Furthermore, the telephonic "meeting" was not a mere procedural defect; it was in contravention to the regulations and Local Board Memoranda; and the Board therefore acted in excess of its jurisdiction.

See: In Re Shapiro, 3d Cir., 1968, 392 F.2d, 397

Hence, the Board never really held a meeting and therefore never ruled one way or the other on appellant's request for reopening. Appellant was entitled to such a decision.

Finally, appellant was prejudiced by the telephonic "meeting" because it deprived him of his personal appearance and appeal rights.

See: MacMurray v. United States, 9th Cir., 1964, 330 F.2d 298.

Boswell v. United States, 9th Cir., 1968, 390 F.2d 181.

Appellant's theory of the case, that is, that his claim was filed before the mailing date of his induction notice, obviates the need for discussing the maturation date of his beliefs.

While the record is somewhat equivocal as to the precise date thereof, we note that at trial, appellant answered that question on cross-examination, thusly:

> "A. Well, it's not something you know that you can say yesterday I wasn't, today I am. Its the kind of thing that comes together with the realization that you're being called upon to participate in the military service.
>
> "At that time I'm confronted with the realistic problem and at this time that

the realization becomes uppermost in your mind even though its been there all along."

(R. 32/21 - 33/4).

The Court recognized this as a rational basis for reopening in Gearey, supra, 368 F.2d at p.150, when it observed:

"The realization that induction is pending and that he may soon be asked to take another's life, may cause a young man finally to crystallize and articulate his once vague sentiments."

(Emphasis supplied)

We also note that appellant not only refused to submit to induction, but even rejected a Commission in the United States Navy (Ex. A, p.130), although at one time he apparently had considered applying for one (Ex. A, pp. 72, 130; and, in the same vein, see also appellant's letter of April 13, 1965, at p. 54).

All doubts as to appellant's eligibility for reopening of his classification should be resolved in his favor.

United States v. Alvies, D.C., N.D. Ca. 1953, 112 F. Supp. 618, 624

But we believe there can be no doubt that appellant's claim was timely, and that if, as suggested by the Government's Brief (p.15) the Board refused to reopen because believing appellant's claim untimely, such denial was prejudicial error, necessarily invalidating appellant's induction orders, and the

return of the file to the Board for an evaluation of appellant's claim by proper standards.

POINT II

APPELLANT'S INDUCTION NOTICE WAS INVALID BECAUSE MAILED BEFORE THE EXPIRATION OF THE TIME AFFORDED AN APPEAL AGENT FOR FILING AN APPEAL IN APPELLANT'S BEHALF.

Appellant will not belabor this point because the government offers no authorities to counter those suggested in Appellant's Opening Brief as prevailing; and because the question here is primarily one of statutory construction and interpretation.

CONCLUSION

For all the reaons given in appellant's Opening Brief, and in this one, his conviction should be reversed, and the indictment ordered dismissed; or, in the alternative, the case should be remanded, pending review, for further evidence as suggested by appellant's unopposed motion.

Respectfully submitted,

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C E R T I F I C A T E

I CERTIFY that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the 9th Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

David B. Finkel

DAVID B. FINKEL